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IN THE

# Supreme Court of the United States

October Term, 1956.

No. ~~1074~~ 179

THOMAS EISTRAT,

*Petitioner,*

*vs.*

BRUSH INDUSTRIAL LUMBER COMPANY, a corporation, and JOHN A. BRUSH,

*Respondents.*

## Brief of Respondents in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of California.

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KENNETH M. LISKUM,
*Associate Counsel.*

## SUBJECT INDEX


| | PAGE |
|---|---|
| Grounds on which the jurisdiction of this court is invoked | 1 |
| Questions presented for review | 2 |
| Constitutional provisions involved | 2 |
| Statement of the case | 2 |
| Reasons for allowance of writ | 3 |
| Respondents' demurrer to plaintiff's third amended complaint is in full shown on pages 35 to 40 of the Clerk's Transcript | 4 |
| Conclusion | 4 |
| Appendix "A." Points and authorities | App. p. 1 |


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## TABLE OF AUTHORITIES CITED


| STATUTES | PAGE |
|---|---|
| Code of Civil Procedure, Sec. 170(a) | 3 |
| United States Code, Title 28, Sec. 1257 | 2 |
| United States Constitution, Fourteenth Amendment | 2 |

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## Brief of Respondents in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of California.

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Respondents herein, Brush Industrial Lumber Company, a corporation, and John A. Brush file their brief in opposition to the petition of Thomas Eistrat for Writ of Certiorari to the Supreme Court of the State of California.

## Grounds on Which the Jurisdiction of This Court Is Invoked.

(a) Respondents do not believe that the state courts, in any respect disregarded or failed to follow the final judgment entered in the United States District Court in favor of petitioner herein or that

(b) Title 28, Section 1257, United States Code assists him in his attempt to get this matter before this Court for the reason that the facts herein do not warrant his claim that he has been divested of property in contravention of Amendment XIV of the United States Constitution or any other provision of said Constitution.

## Questions Presented for Review.

Petitioner's statement that there was no trial upon the merits is untrue. On page 4 of the opinion in question here, Appendix "A," attached to his own Petition is found a footnote, placed there by the District Court of Appeal which indicates that the trial consumed four days and the Reporter's Transcript covers 302 pages.

## Constitutional Provisions Involved.

Respondents submit that there are none.

## Statement of the Case.

Petitioner's opening paragraph is untrue as hereinabove set forth.

As shown by referring to the footnote at the end of Petitioner's own Appendix "A" attached to his Petition, he did fully present his case.

Respondents believe that Petitioner's troubles with his attorney as set forth on pages 3 and 4 of his Petition present no material facts. No statement is made that Respondents had anything to do with these troubles or were the responsible cause of any neglect, inattention, mistake or incompetency of Petitioner's attorney.

Respondents further believe that the facts set forth on pages 4 and 5 present nothing material here.

As set forth on page 5 in his Petition, this matter has really been before this Court before being No. 403, October term, 1954.

His recitation of facts set forth beginning at bottom of page 5 and continuing thru to top of page 7 is apparently accurate but Respondents see nothing there which would justify issuance of the Writ.

Actually the only point involved here, in this case, as shown in Petitioner's Appendix "A" is whether or not the demurrer to Petitioner's Third Amended Complaint should have been sustained without leave to Amend—a matter of state law and the rules of pleading.

## Reasons for Allowance of Writ.

Respondents cannot believe that Petitioner has stated any reason for allowance of the Writ.

At the bottom of page 7, under 1—, he sets forth that he filed a petition in which he charged that the decision of the District Court of Appeal lacked the concurrence of two Justices qualified as required by section 170a of the Code of Civil Procedure yet he fails to acquaint this Court, or any other court, with any valid reasons for this conclusion. And this is true of each and all of his various Petitions and Briefs. A reputation of all of his charges is contained in Appendix "A," the Opinion of the District Court of Appeal attached to his Petition.

As previously pointed out, this case has to do with whether or not Petitioner was properly demurred out of court on his Third Amended Complaint. As he apparently hasn't seen fit to include Respondents' Reply Brief in the Certified Record, Respondents attach hereto as Appendix "A," their Points and Authorities to said demurrer.

Petitioner's Third Amended Complaint is in full shown on pages 25 to 35, inclusive of the Clerk's Transcript.

Petitioner's Amended Complaint, many paragraphs of which are incorporated by reference in his Third Amended Compaint is in full shown on pages 1 to 24 of the Clerk's Transcript.

**Respondents' Demurrer to Plaintiff's Third Amended Complaint Is in Full Shown on Pages 36 to 40 of the Clerk's Transcript.**

There appears to be no point in repeating these pleadings here.

It is obvious there are no reasons for granting the Writ. The decisions of the courts below were fair and just and fully in line with the applicable decisions of state and federal courts.

There is no conflict of decisions and nothing of importance to anyone other than Petitioner and Respondents. There just isn't any merit whatever to Petitioner's contentions either in this Court or the courts below.

## Conclusion.

Respondents pray, for the foregoing reasons, that Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted,

WENDELL W. SCHOOLING,
*Counsel for Respondents.*

KENNETH M. LISKUM,
*Associate Counsel.*

## APPENDIX "A."

### Points and Authorities.

FIRST.

1. A complaint which on its face discloses a previous adverse adjudication of the claim alleged, or of some fact essential to it, fails to state a cause of action and is not saved by allegations as to some matters going to the merits which are not presented in the former action.

*Hooker v. East Riverside Irr. Dist.*, 38 Cal. App. 615;

15 Cal. Jur., par. 20, p. 210.

2. Allegations of the complaint to warrant a decree erasing a judgment must show wherein judgment is wrong or that a new trial would with reasonable certainty result in a judgment more favorable to the complaining party.

*Machado v. Machado*, 66 Cal. App. 2d 401.

3. Equity will not grant relief against a judgment at law, where such judgment was obtained in consequence of the neglect, inattention, mistake or incompetency of the attorney, unless caused by the other party.

*Greenwood v. Greenwood*, 112 Cal. App. 691.

4. Actions in trespass and for a conversion must be brought within three years of the accrual thereof.

*Code Civ. Proc.*, Subds. 2 and 3.

5. Actions on oral contract must be brought within two years of the accrual thereof.

*Code Civ. Proc.*, Sec. 339, Subd. 1.

6. A pleading must be construed most strongly against the pleader . . . and, so construed, the complaint fails

to state a cause of action. If the allegations are silent as to dates, and it appears that such dates are material to the issue, it must be presumed that a statement of such dates would have weakened the pleader's case. The same rule applies when the pleader fails to make a clear specific statement of the facts relied on.

*Whittemore v. Davis*, 112 Cal. App. 702.

SECOND.

Actions in trespass and for a conversion must be brought within three years of the accrual thereof.

*Code Civ. Proc.*, Sec. 338, Subds. 2 and 3.

Actions on oral contract must be brought within two years of the accrual thereof.

*Code Civ. Proc.*, Sec. 339, Subd. 1.

THIRD.

(a) Pleadings must be definite and certain.

*Code Civ. Proc.*, Sec. 430, Subd. 9.

(b) A pleading must be construed most strongly against the pleader . . . . and, so construed, the complaint fails to state a cause of action. If the allegations in a pleading are silent as to dates, and it appears that such dates are material to the issue, it must be presumed that a statement of such dates would have weakened the pleader's case. The same rule applies when the pleader fails to make a clear specific statement of the facts relied on.

*Whittemore v. Davis*, 112 Cal. App. 702.

FOURTH.

Causes of action must be separately stated in a complaint.

*Code Civ. Proc.*, Sec. 430, Subd. 5.

FIFTH.

Pleadings must be unambigous.

*Code Civ. Proc.*, Sec. 430, Subd. 7.

SIXTH.

Pleadings must be intelligible.

*Code Civ. Proc.*, Sec. 430, Subd. 8.

SEVENTH.

Actions in trespass, for a conversion, and for fraud must be brought within three years of the accrual thereof.

*Code Civ. Proc.*, Sec. 338, Subds. 2, 3 and 4.

SEVENTH (a).

1. A pleading must be construed most strongly against the pleader . . . and, so construed, the complaint fails to state a cause of action. If the allegations in a pleading are silent as to dates, and it appears that such dates are material to the issue, it must be presumed that a statement of such dates would have weakened the pleader's case. The same rule applies when the pleader fails to make a clear specific statement of the facts relied on.

*Whittemore v. Davis*, 112 Cal. App. 702.

2. A complaint which on its face discloses a previous adverse adjudication of the claim alleged, or of some fact essential to it, fails to state a cause of action and is not

saved by allegations as to some matters going to the merits which were not presented in the former action.

*Hooker v. East Riverside Irr. Dist.*, 38 Cal. App. 615.

3. Equity will not grant relief against a judgment at law, where such judgment was obtained in consequence of the neglect, inattention, mistake or incompetency of the attorney, unless caused by the other party.

*Greenwood v. Greenwood*, 112 Cal. App. 691.

4. In order to warrant a decree erasing a judgment procured by extrinsic fraud, it must appear from the allegations of the complaint that the judgment is wrong or that a new trial would with reasonable certainty result in a judgment more favorable to the complaining party.

*Machado v. Machado*, 66 Cal. App. 2d 401.

5. Extrinsic or collateral fraud operates not upon matters pertaining to the judgment itself, but relates to the manner in which it is procured. The ordinary case is where one party is deprived of his opportunity to be heard, by some fraudulent artifice or breach of fiduciary duty of the prevailing party. It is exemplified in those cases

> "Where by reason of something done by the successful party to the suit there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where an attorney fraudulently or without authority assumes to represent a part and connives at his defeat; or where the attorney regularly employed

corruptly sells out his client's interest to the other side; these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a suit may be sustained to set aside or annul the former judgment or decree, and open the case for a new and fair hearing."

"In this class of cases relief is granted upon the ground that by some fraud practiced directly upon the party seeking relief, he has been prevented from presenting all of his case to the court."

15 Cal. Jur. par. 123, pp. 15-16.

6. Allegations showing extrinsic fraud are essential.

*La Salle v. Peterson*, 220 Cal. 739.

7. Facts constituting the fraud must be pleaded with particularity and specifically.

*Hammell v. Britton*, 19 Cal. App. 2d 72.

8. "The correctness of a judgment cannot be reviewed in an independent action upon any ground available in the original proceedings but which the complaining party negligently failed to take advantage of, or of which he has availed himself in proceedings still pending, such as on motion for new trial. If the matter relied upon is such that the party complaining could have placed it before the court in the original action, either upon the issues joined or upon motion to set aside the verdict or judgment, it is not ground for equitable interference. Hence if, after knowledge of the facts, he fails to seek relief by motion during the time in which such remedy is open to him, he cannot afterwards resort to equity."

15 Cal. Jur. par. 127, p. 26.

9. A fact which constitutes an essential element of a cause of action must be alleged with certainty and cannot be left to an inference.

*Roberts v. Roberts,* 81 Cal. App. 2d 871.

10. A complaint may not be aided in its allegations by reference to prior superseded pleadings and portions or parts thereof.

41 Am. Jur., par. 59, pp. 329-330.

EIGHTH.

Pleadings should be definite, certain and perspicuous.

21 Cal. Jur., par. 23, p. 42;

*Code Civ. Proc.,* Sec. 430, Subd. 9.

NINTH.

When several causes of action are not separately stated, it is ground for demurrer.

*Code Civ. Proc.,* Sec. 430, Subd. 5.

TENTH.

Pleadings must be unambiguous.

*Code Civ. Proc.,* Sec. 430, Subd. 7.

Pleadings must be definite, certain and perspicuous.

21 Cal. Jur., par. 23, p. 42.

ELEVENTH.

Pleadings must be intelligible.

*Code Civ. Proc.,* Sec. 430, Subd. 8.

TWELFTH.

A pleading must be construed most strongly against the pleader . . . . If the allegations in a pleading are silent as to dates, and it appears that such dates are ma-

terial to the issue, it must be presumed that a statement of such dates would have weakened the pleader's case.

*Whittemore v. Davis*, 112 Cal. App. 702.

Pleadings should be definite, certain and perspicuous.

It is requisite of all good pleading that the allegations be clearly and distinctly made, so that they may be fully understood by the adverse party, the counsel, the jury and the judges, and especially as regards the complaint, that the defendant may be enabled to plead any judgment which may be rendered in bar of any subsequent action for the same cause.

21 Cal. Jur. 23, p. 42.

*Code Civ. Proc.*, Sec. 430, Subd. 9.

THIRTEENTH.

1. A complaint which on its face discloses a previous adverse adjudication of the claim alleged, or of some fact essential to it, fails to state a cause of action and is not saved by allegations as to some matters going to the merits which are not presented in the former action.

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